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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HM ELECTRONICS, INC., a
California corporation,

Plaintiff,

vs.

R.F. TECHNOLOGIES, INC., an
Illinois corporation; and Babak
Noorian, an individual.

Defendants.

No. 12-CV-2884-BAS (MDD)

REDACTED JOINT MOTION
REGARDING PLAINTIFF HM
ELECTRONICS, INC.'S
REQUEST FOR (1) ISSUE
SANCTIONS AND
EVIDENTIARY SANCTIONS
AGAINST DEFENDANTS
PURSUANT TO FED R. CIV. P.
37(b); (2) AN ADVERSE
INFERENCE INSTRUCTION
REGARDING DEFENDANTS'
WITHHOLDING OF
DOCUMENTS AND
SPOILIATION OF EVIDENCE;
AND (3) A FINDING OF
CONTEMPT AGAINST
DEFENDANTS; AND (4) AN
AWARD OF EXPENSES

Date: None Set
Time: None Set
Judge: Mitchell D. Dembin
Crtrm: 11th Floor Annex

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	JUDGE BURKHARDT’S JULY 3, 2014 DISCOVERY ORDER AND DEFENDANTS’ RESPONSE	1
A.	Relevant Provisions of Judge Burkhardt’s Discovery Order	2
B.	RFT’s Responses By Way of Sworn Affidavits.....	3
1.	Declaration from Defendants’ Counsel Thomas O’Leary	3
2.	Declaration from RFT’s IT Director, Stephen Combs	6
III.	PLAINTIFF’S STATEMENT IN SUPPORT OF ITS REQUEST FOR SANCTIONS AGAINST RFT AND BABAK NOORIAN	9
A.	Summary of Relevant Facts	9
1.	HME’s Trade Libel Claim and Lanham Act False Advertising Claims	9
2.	RFT’s Responses to Discovery Related to HME’s Trade Libel Claim and Lanham Act False Advertising Claim	11
3.	Early Deposition Testimony Regarding the Structural Failures Document and Related Materials	12
4.	RFT’s Failure to Produce Responsive Documents	14
5.	RFT’s Initial ESI Production	16
6.	RFT Wrongfully Withheld Over 100,000 Pages of ESI	18
7.	RFT Improperly Withheld Documents Relevant to HME’s Trade Libel and Lanham Act False Advertising Claims	19
8.	RFT Selectively Produced Hard Copy Documents	21
B.	Reasons Why This Court Should Impose Sanctions Against RFT and Mr. Noorian	24
1.	The Court Should Impose Issue Sanctions and Evidentiary Sanctions Against RFT and Mr. Noorian	24
2.	The Falsity of the Structural Failures Document and the Average Rate of Repair and Cost Information Should be Taken as Established Facts.	25
3.	RFT and Mr. Noorian’s Awareness of the Creation and Distribution of the Structural Failures Document and Average Repair Rate Information Should be Taken as Established Facts	26

1	4.	The Court Should Preclude RFT and Mr. Noorian from	
2		Asserting that HME Was Not Damaged by the Structural	
3		Failures document, the Average Repair Rate Information,	
4		or Derivative Materials	28
5	5.	The Court Should Partially Strike Defendants’ First, Ninth	
6		and Fourteenth Affirmative Defenses	29
7	6.	The Court Should Establish a Rebuttable Presumption that	
8		RFT’s False Statements Regarding the ION IQ Were a	
9		Substantial Factor in RFT’s Sales of the Panasonic Attune	30
10	C.	Reasons Why This Court Should Issue a Report and	
11		Recommendation to the District Judge to Provide an Adverse	
12		Inference Instruction at Trial	31
13	D.	Reasons Why This Court Should Issue a Report and	
14		Recommendation to the District Judge to Find Defendants in	
15		Contempt of Court.....	33
16	E.	RFT’s Recent Deposition Testimony Does Not Mitigate the Sanctions	
17		Requested by HME	34
18	F.	Reasons Why HME is Entitled to an Award of Expenses	38
19	IV.	DEFENDANTS’ STATEMENT IN OPPOSITION TO PLAINTIFF’S	
20		REQUEST FOR SANCTIONS AGAINST RFT AND BABAK	
21		NOORIAN	39
22	A.	INTRODUCTION.....	39
23	B.	STATEMENT OF FACTS.....	40
24	1.	Defendants Did Not Intentionally Destroy Any Relevant	
25		Documents.....	40
26	2.	Defendants Did Not Intentionally Delay Producing Any	
27		Relevant Documents	42
28	C.	ARGUMENT	46
	1.	Alleged Failure to Produce Documents Related to the IQ	
		Structural Failures Document.	46
	2.	Alleged Intentional Withholding of Documents Relevant to	
		RFT’s False Statements	48
	3.	Alleged “Selective” Production of Emails Regarding the	
		Distribution of the IQ Structural Failures Document	49
	4.	Alleged “Destruction” of Information Regarding	
		“Widespread Dissemination” of the IQ Structural Failures	
		Report.....	50

1	5.	Alleged Withholding or Destruction of Evidence	
2		Undermining Affirmative Defenses.....	51
3	6.	There Is No Basis for a “Rebuttable Presumption” that	
4		RFT’s False Statements Were a Substantial Factor in	
5		RFT’s Sales of the Panasonic Attune.....	52
6	7.	An Adverse Inference Instruction is Unwarranted	53
7	8.	There Is No Basis to Recommend a Finding of Contempt.	54
8	9.	Mr. Noorian’s Deposition Cleared Up All Remaining	
9		Issues	55
10	10.	HME is Not Entitled to an Award of Expenses.	56
11	11.	The Court Should Not Impose Any Sanctions.....	56
12	D.	CONCLUSION	57

TABLE OF AUTHORITIES

Cases

<i>Apple Inc. v. Samsung Elecs. Co., Ltd.</i> , 881 F. Supp. 2d 1132 (N.D. Cal. 2012).....	32
<i>Apple, Inc. v. Samsung Elec. Co., Ltd.</i> , 888 F. Supp. 2d 976 (N.D. Cal. 2012).....	31, 33, 56
<i>Baliotis v. McNeil</i> , 870 F.Supp. 1285 (M.D.Pa.1994).....	56
<i>Chin v. Port Auth. of New York & New Jersey</i> , 685 F.3d 135 (2d Cir.2012)	57
<i>Donovan v. Mazzola</i> , 716 F.2d 1226 (9th Cir. 1983)	34
<i>FTC v. Affordable Media</i> , 179 F.3d 1228 (9th Cir. 1999)	33
<i>Glover</i> , 6 F.3d at 1329 (9th Cir. 1993)	32
<i>Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.)</i> , 244 F.R.D. 179 (S.D.N.Y. 2007).....	31
<i>Hyde & Drath v. Baker</i> , 24 F.3d 1162 (9th Cir. Cal. 1994)	38, 56
<i>In re Napster</i> , 462 F.Supp.2d at 1066–67	56, 57
<i>Jackson Family Wines, Inc. v. Diageo N. Am., Inc.</i> , No. 11-5639 EMC (JSC), 2014 U.S. Dist. LEXIS 19420 (N.D. Cal. Feb. 14, 2014)	32
<i>Leon</i> , 464 F.3d 959	33
<i>Micron Tech., Inc. v. Rambus Inc.</i> , 645 F.3d 1311 (Fed. Cir. 2011)	31

1	<i>Nursing Home Pension Fund v. Oracle Corp.</i> ,	
2	254 F.R.D. 559 (N.D.Cal.2008)	56
3	<i>Residential Funding</i> ,	
4	306 F.2d at 108	31, 32, 33
5	<i>Schmid v. Milwaukee Elec. Tool Corp.</i> ,	
6	13 F.3d 76 (3d Cir.1994)	56
7	<i>Stone v. City and Cnty. of San Francisco</i> ,	
8	968 F.2d 850 (9th Cir. 1992)	34
9	<i>Toth v. Trans World Airlines, Inc.</i> ,	
10	862 F.2d 1381 (9th Cir. 1988)	38
11	<i>Unigard Security</i> ,	
12	982 F.2d at 368	57
13	<i>Zubulake v. UBS Warburg LLC</i> ,	
14	229 F.R.D. 422 (S.D.N.Y. 2004)	32

Statutes and Codes

Federal Rules of Civil Procedure

15	Rule 30(b)(6)	passim
16	Rule 37	24
17	Rule 37(b)(2)(A)(iv)	57
18	Rule 37(b)(2)(C)	38

19	Lanham Act	passim
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Rules and Regulations

21	Local Rule 7.1(h)	39
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1 **I. INTRODUCTION**

2 Plaintiff HM Electronics, Inc. (“HME”), and Defendants R.F. Technologies,
3 Inc. (“RFT”) and Babak Noorian (collectively, “Defendants”), submit this joint
4 motion regarding HME’s request for a contempt finding and sanctions against
5 Defendants for failing to comply with Judge Burkhardt’s July 3, 2014 Discovery
6 Order, and for otherwise impeding and abusing the discovery process.

7 HME became aware of some of the facts supporting this motion in September
8 2014, and other facts became evident after that date. Counsel for the parties met and
9 conferred telephonically in September 2014, and as a result of that discussion RFT
10 served additional documents on September 26, 2014, October 9, 2014 and October
11 23, 2014. Counsel for the parties then met and conferred again on December 1,
12 2014.

13 It is HME’s position, after having had a chance to preliminarily review these
14 additional productions, and after taking Mr. Noorian’s deposition as RFT’s Federal
15 Rule of Civil Procedure 30(b)(6) designee on various issues related to RFT’s
16 document production, that RFT failed to comply with Judge Burkhardt’s Order, and
17 Defendants have otherwise engaged in discovery misconduct without justification.

18 **II. JUDGE BURKHARDT’S JULY 3, 2014 DISCOVERY ORDER AND**
19 **DEFENDANTS’ RESPONSE**

20 HME’s request for a contempt finding and for sanctions against Defendants
21 arises principally from a Discovery Order issued by Judge Burkhardt on July 3,
22 2014. (ECF No. 185.) The relevant portions of Judge Burkhardt’ Order, and RFT’s
23 sworn written responses to the Order, are set forth below.
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25
26
27
28

1 **A. Relevant Provisions of Judge Burkhardt’s Discovery Order**

2 [T]he January 22, 2014 letter¹ addressed the following nine categories of
3 documents:

- 4 1. All e-mails and other communications regarding the “HM Electronics
5 IQ Structural Failures” document published by RFT;
- 6 2. Documents concerning the factual support for RFT’s quality and
7 durability claims;
- 8 3. Documents concerning the creation, receipt, use, publication and
9 distribution of the “HM Electronics IQ Structural Failures” document
10 published by RFT;
- 11 4. Documents concerning the tests and analyses depicted in the HME
12 Electronics IQ Structural Failures report;
- 13 5. Communications between RFT and any third party regarding HME (i.e.
14 customers, suppliers, vendors, dealers, testing facilities, competitors);
- 15 6. All communications with and invoices from LS Research;
- 16 7. All product comparison documents, and e-mails concerning the same;
- 17 8. Documents supporting RFT’s representations regarding post-warranty
18 repair rates and costs for HME products; and
- 19 9. Communications with the dealers and distributors.

20
21 As to each of these items, Defendant represented in the January 22,
22 2014 joint letter that it would undertake further searches for responsive
23 documents. The January 27, 2014 Order required Defendant to complete the
24 outstanding document production with respect to these categories of
documents (as well as those discussed in II.B. *supra*) by February 10, 2014.

25 ***

26
27
28 ¹ The January 22, 2014 letter refers to the parties’ joint letter to Magistrate Judge McCurine on that date, which led to Judge McCurine’s Discovery Order dated January 27, 2014.

[T]he parties are hereby ordered to finalize their twenty-two search term agreement on or before July 17, 2014, and absent leave of Court, Defendant shall complete its ESI searches using the twenty-two agreed upon search terms on or before August 4, 2014. (Footnote omitted.)

(See ECF No. 185.)²

B. RFT's Responses By Way of Sworn Affidavits

In her July 3, 2014 Order, Judge Burkhardt directed RFT to provide a sworn affidavit regarding RFT's efforts to search for and produce various categories of documents, including electronically stored information. RFT provided two affidavits in response, one from its counsel and one from its IT Director, Stephen Combs. The relevant portions of each are set forth below.

1. Declaration from Defendants' Counsel Thomas O'Leary

RFT was ordered to produce all emails and other communications regarding the "HM Electronics IQ Structural Failures" document it published. (Dkt. No. 185, p.12:21-22). However, RFT has already produced to Plaintiffs counsel its emails and other communications regarding the "HM Electronics IQ Structural Failures" document. RFT contends that the Bates numbers for the documents responsive to this Request includes, but is not limited to the following: RF000155-RF000262. Accordingly, RFT respectfully requests that this Court deems this portion of the Discovery Order as moot due to its dutiful compliance by way of its document production.

RFT was ordered to produce all documents concerning the factual support for its quality and durability claims pertaining to its products. (Dkt. 22 No. 185, p.12:23-24). However, RFT has already produced to Plaintiff's counsel its documents concerning the factual support for its quality and durability claims pertaining to its products. RFT contends that the Bates numbers for the documents responsive to this Request includes, but is not limited to the following: RF017538-RF018468; RF001034-RF01124; RF016770-RF017489; RF017538-RF018468; 27 RF011497-RF011517; RF011518-RF016021; RF016022-RF016251; RF016252-28 RF016603; RF017490-RF017519; RF018469-RF021288; and RF200081. Accordingly,

² The initial ESI search terms and revised ESI search terms agreed to by the parties are set forth in the e-mails attached to the Herrera Declaration as Exhibit 1.

1 RFT respectfully requests that this Court deems this portion of the Discovery
2 Order as moot due to its dutiful compliance by way of its document
3 production.

4 RFT was ordered to produce documents concerning the creation,
5 receipt, use, publication and distribution of the “HM Electronics IQ Structural
6 Failures” document. (Dkt. No. 185, p.12:25-26). However, RFT has already
7 produced to Plaintiff’s counsel its documents concerning the creation, receipt,
8 use, publication and distribution of the “HM Electronics IQ Structural
9 Failures” document. RFT contends that the Bates numbers for the documents
10 responsive to this Request includes, but is not limited to the following:
RF00015511 RF000262. Accordingly, RFT respectfully requests that this
Court deems this portion of the Discovery Order as moot due to its dutiful
compliance by way of its document production.

11 RFT was ordered to produce documents concerning the testing and
12 analyses depicted in the “HME Electronics IQ Structural Failures” report.
13 (Dkt. No. 185, p.12:27-28). However, RFT has already produced to Plaintiff’s
14 counsel its documents concerning the testing and analyses depicted in the
15 “HME Electronics IQ Structural Failures” report. RFT contends that the Bates
16 numbers for the documents responsive to this Request includes, but is not
17 limited to the following: RF017538-RF018468; RF001034-RF01124;
18 RF016770-RF017489; 21 RF017538-RF018468; RF011497-RF011517;
19 RF011518-RF016021; RF016022-22 RF016251; RF016252-RF016603;
RF017490-RF017519; RF018469-RF021288; and RF200081. Accordingly,
RFT respectfully requests that this Court deems this portion of the Discovery
Order as moot due to its dutiful compliance by way of its document
production.

20 RFT was ordered to produce all communications between it and any
21 third-party (*i.e.*, customers, suppliers, vendors, dealers, testing facilities,
22 competitors) regarding HME. (Dkt. No. 185, p.13:1-2). However, RFT has
23 already produced to Plaintiff’s counsel documents reflecting the
24 communications between it and third-parties regarding HME. RFT contends
25 that the Bates numbers for the documents responsive to this Request includes,
26 but is not limited to the following: RF000263-RF000729; RF000734-
27 RF000995; RF001034-RF01124; RF016770-5 RF017489; and RF000730-
28 RF000731. Accordingly, RFT respectfully requests that this Court deems this
portion of the Discovery Order as moot due to its dutiful compliance by way
of its document production.

1 RFT was ordered to produce all communications with, and invoices
2 from LS Research. (Dkt. No. 185, p.13:3). However, RFT has already
3 produced to Plaintiff's counsel its communications with, and its invoices from
4 LS Research. Moreover, this was only an informal document request by
5 Plaintiff's counsel, as this was not specifically requested as part of Plaintiffs
6 First Set of Request for Production of Documents. Accordingly, RFT
7 respectfully requests that this Court deems this portion of the Discovery Order
8 as moot due to its dutiful compliance by way of its document production.

7 RFT was ordered to produce all product comparison documents, and
8 emails concerning all product comparisons as well. (Dkt. No. 185, 18 p.13:4).
9 However, RFT has already produced to Plaintiff's counsel its product
10 comparison documents, and emails concerning product comparisons as well.
11 RFT contends that the Bates numbers for the documents responsive to this
12 Request includes, but is not limited to the following: RF001034-RF01124;
13 RF016770-22 RF017489; RF017538-RF018468; and RF002257-RF011496;
14 RF011497-23 RF011517; and RF000155-RF000262. Accordingly, RFT
15 respectfully requests that this Court deems this portion of the Discovery Order
16 as moot due to its dutiful compliance by way of its document production.

14 RFT was ordered to produce documents supporting its representations
15 regarding post-warranty repair rates and costs for HME products. (Dkt. No.
16 185, p.13:5-6). However, RFT has already produced to Plaintiffs counsel
17 documents supporting its representations regarding post-warranty repair rates
18 and costs for HME products. RFT contends that the Bates numbers for the
19 documents responsive to this Request includes, but is not limited to the
20 following: RF001034-RF01124; RF016770-RF017489; RF011497-
21 RF011517; RF017538-5 RF018468; RF011518-RF016021; RF016022-
22 RF016251; RF016252-RF016603; RF017490-RF017519; RF018469-
23 RF021288; RF200081; RF000155-RF000262; RF000263-RF000729;
24 RF000734- RF000995; and RF200107. Accordingly, RFT respectfully
25 requests that this Court deems this portion of the Discovery Order as moot due
26 to its dutiful compliance by way of its document production.

24 RFT must produce all communications with its dealers and distributors.
25 (Dkt. No. 185, p.13:7). However, RFT has already produced to Plaintiff's
26 counsel its communications with its dealers and distributors. RFT contends
27 that the Bates numbers for the documents responsive to this Request includes,
28 but is not limited to the following: RF000263-RF000729; RF000734-
RF000995; RF001034-RF01124; RF016770-RF017489; and RF000730-
RF000731. Accordingly, RFT respectfully requests that this Court deems this

1 portion of the Discovery Order as moot due to its dutiful compliance by way
2 of its document production.

3 RFT must conduct a broad-based ESI search using twenty-two agreed
4 upon search terms, and it must produce documents resulting from such ESI
5 searches. (Dkt. No. 185, p.13:13-17). However, RFT has already produced the
6 documents resulting from the foregoing ESI searches to Plaintiff's counsel.
7 Moreover, this was only an informal document request by Plaintiff's counsel,
8 as this was not specifically requested as part of Plaintiffs First Set of Request
9 for Production of Documents. Accordingly, RFT respectfully requests that this
10 Court deems this portion of the Discovery Order as moot due to its dutiful
11 compliance by way of its document production.

12 (See ECF No. 192.)

13 **2. Declaration from RFT's IT Director, Stephen Combs**

14 In addition to the documents identified at paragraph 13 above, I
15 provided a wealth of electronic data to RFT's electronic discovery vendor.
16 More particularly, I provided the vendor with 4 Exchange Information Stores
17 and 17 PST files that totaled over 300GB to be searched using key terms. The
18 files provided to the vendor are identified in Exhibit A. The Exchange
19 Information Stores included 146 individual email accounts that are described
20 in the attached Exhibit B. It is my understanding that these email accounts
21 were searched using key terms provided by Plaintiff. I am informed and
22 believe that the search terms utilized by the vendor included the following:
23 "HME or HM Electronics," "PanasonicRepairs, Sales and Service," "3M-
24 Repairs, Sales and Service," "IQ Structural," "Briem," "LS Research,"
"Product Comparison," "Service Summary," "HS6000/6000 headset," "ION,"
"HS61 00/6100 headset," "Com2000," "Com6000," "Com61 00," "Com400,"
"RF6000," "Case," "Beyond economic repair/BER," "HS12," "OEM" and
"HS9." I am further informed and believe that these search terms were later
revised to include certain boolean search limiters.

25 RFT was ordered to produce all emails and other communications
26 regarding the "HM Electronics IQ Structural Failures" document it published.
27 (Dkt. No. 185, p.12:21-22). The data described at paragraph 14 above, contains
28 the email and communications responsive to this directive. I am also informed
and believe that RFT's counsel provided to Plaintiff's counsel responsive

1 communications in the form documents bearing Bates numbers that include,
2 but are not limited to, the following: RF000155-RF000262. RFT was ordered
3 to produce all documents concerning the factual support for its quality and
4 durability claims pertaining to its products. (Dkt. No. 185, p.12:23-24). RFT
5 provided factual support for its quality and durability claims to its counsel. I
6 am informed and believe that, prior to July 3, 2014, RFT's counsel provided
7 Plaintiff's counsel with information responsive to this directive in the form of
8 documents bearing Bates numbers that include, but are not limited to, the
9 following: RF017538-RF018468; RF001034-RF01124; RF016770-RF017489;
10 RF017538-RF018468; RF011497-RF011517; RF011518-RF016021;
11 RF016022- RF016251; RF016252-RF016603; RF017490-RF017519;
12 RF018469-RF021288; and RF200081.

13 RFT was ordered to produce documents concerning the creation,
14 receipt, use, publication and distribution of the "HM Electronics IQ Structural
15 Failures" document. (Dkt. No. 185, p.12:25-26). RFT provided documents
16 concerning the creation, receipt, use, publication and distribution of the "HM
17 Electronics IQ Structural Failures" document to its counsel. I am informed and
18 believe that, prior to July 3, 2014, RFT's counsel produced to Plaintiff's
19 counsel documents concerning RFT's creation, receipt, use, publication and
20 distribution of the "HM Electronics IQ Structural Failures" document in form
21 of documents bearing Bates numbers that include, but are not limited to, the
22 following: RF000155-RF000262.

23 RFT was ordered to produce documents concerning the testing and
24 analyses depicted in the "HME Electronics IQ Structural Failures" report.
25 (Dkt. No. 185, p.12:27-28). RFT provided to its counsel documents concerning
26 the testing and analyses depicted in the "HME Electronics IQ Structural
27 Failures" report. I am informed and believe that, prior to July 3, 2014, RFT's
28 counsel provided to Plaintiff's counsel information concerning the testing and
analyses depicted in the "HME Electronics IQ Structural Failures" report in
the form of documents bearing Bates numbers that include, but are not limited
to, the following: RF017538-RF018468; RF001034-RF01124; RF016770-
RF017489; RF017538-RF018468; RF011497-RF011517; RF011518-
RF016021; RF016022- RF016251; RF016252-RF016603; RF017490-
RF017519; RF018469-RF021288; and RF200081.

RFT was ordered to produce all communications between it and any
third-party (*i.e.*, customers, suppliers, vendors, dealers, testing facilities,
competitors) regarding HME. (Dkt. No. 185, p.13:1-2). The data described at
paragraph 14 above contains the communications between RFT and any third

1 party regarding HME. In addition, I am informed and believe that, prior to
2 July 3, 2014, RFT's counsel provided to Plaintiff's counsel responsive
3 communications in the form of documents bearing Bates numbers that include,
4 but are not limited to, the following: RF000263-RF000729; RF000734-
5 RF000995; RF001034-RF01124; RF016770-RF017489; and RF000730-
6 RF000731.

7 RFT was ordered to produce all communications with, and invoices
8 from, LS Research. (Dkt. No. 185, p.13:3). The data described at paragraph 14
9 above contains all email communications with LS Research. Moreover, I am
10 informed and believe that this was only an informal document request by
11 Plaintiff's counsel and was not specifically requested as part of Plaintiffs First
12 Set of Request for Production of Documents.

13 RFT was ordered to produce all product comparison documents and
14 emails concerning all product comparisons as well. (Dkt. No. 185, p.13:4). The
15 data described at paragraph 14 above contains all email concerning product
16 comparisons. I am informed and believe that, prior to July 3, 2014, RFT's
17 counsel provided to Plaintiffs counsel with responsive documents in the form
18 of documents bearing Bates numbers that include, but are not limited to the
19 following: RF001034-RF01124; RF016770-RF017489; RF017538-
20 RF018468; and RF002257-RF011496; RF011497-RF011517; and RF000155-
21 RF000262.

22 RFT was ordered to produce documents supporting its representations
23 regarding post-warranty repair rates and costs for HME products. (Dkt. No.
24 185, p.13:5-6). I provided summary spreadsheets to counsel for RFT that
25 contained information responsive to this directive. I am informed and believe
26 that, prior to July 3, 2014, RFT's counsel provided to Plaintiff's counsel
27 documents supporting its representations regarding post-warranty repair rates
28 and costs for HME products in the form of documents bearing Bates numbers
that include, but are not limited to, the following: RF001034-RF01124;
RF016770-RF017489; RF011497-RF011517; RF017538-RF018468;
RF011518-RF016021; RF016022-RF016251; RF016252-RF016603;
RF017490-RF017519; RF018469-RF021288; RF200081; RF000155-
RF000262; RF000263-RF000729; RF000734-RF000995; and RF200107.

RFT must produce all communications with its dealers and distributors.
(Dkt. No. 185, p.13:7). The data described at paragraph 14 above contains
RFT's communications with its dealers. In addition, I am informed and
believe that, prior to July 3, 2014, RFT's counsel provided to Plaintiff's

counsel additional communication with RFT's dealers and distributors bearing Bates numbers that include, but are not limited to, the following: RF000263-RF000729; RF000734- RF000995; RF001034-RF01124; RF016770-RF017489; and RF000730-RF000731.

RFT must conduct a broad-based ESI search using twenty-two agreed upon search terms, and it must produce documents resulting from such ESI searches. (Dkt. No. 185, p.13: 13-17). As set forth at paragraph 14 above, RFT has already produced the documents resulting from the foregoing ESI searches to Plaintiff's counsel.

(See Exh. 2 to Herrera Decl.)

III. PLAINTIFF'S STATEMENT IN SUPPORT OF ITS REQUEST FOR SANCTIONS AGAINST RFT AND BABAK NOORIAN

A. Summary of Relevant Facts

1. HME's Trade Libel Claim and Lanham Act False Advertising Claims

HME's First Amended Complaint asserts claims for trade libel and false advertising under the Lanham Act. (ECF No. 156 at pp. 14-16; 18-19.) HME's trade libel claim is based on RFT's creation and distribution of a document entitled "HM Electronics IQ Structural Failures" (the "Structural Failures document"), that pertains to HME's ION IQ wireless all-in-one headset. (Exh. 3 to Herrera Decl.) HME became aware of RFT's distribution of this document in approximately September or October of 2012, when one of HME's customers who received it from RFT forwarded it to HME. HME's false advertising claim under the Lanham Act is based on RFT's creation and distribution of this document, as well as various other acts of false unfair advertising.

RFT designed the Structural Failures document to make it look like an HME internal quality control document, but it is not. It is a document RFT created that attacks the quality and durability of HME's ION IQ headset. The document purports to identify seven structural failure points inherent in the ION IQ headset that were determined by laboratory testing. They were not. The alleged "failure points" are

1 based on the lay observations of two RFT employees after they disassembled one
2 ION IQ headset. (*See* Exh. 4 to Herrera Decl., Crause Depo.) The ION IQ headset
3 does not suffer the structural deficiencies manufactured by RFT.

4 RFT also made false statements of fact about the lifetime repair cost
5 associated with HME's ION IQ headset. (*See* Exh. 5 to Herrera Decl.) In various
6 documents RFT claimed that the headset needed to be repaired every six to eight
7 months, in an effort to dissuade customers from purchasing the ION IQ, and to
8 instead purchase a competing product RFT happened to sell, the Panasonic Attune
9 headset. (Exh. 6 to Herrera Decl.) At the time RFT made these statements the ION
10 IQ headset was still under HME's manufacturer's warranty, and any repairs would
11 have been performed by HME free of charge. Importantly, RFT could not (and still
12 cannot today) repair the ION IQ headset, because it lacks the parts and technical
13 wherewithal to do so. Scott Crause of RFT confirmed that when RFT disseminated
14 the alleged average repair information, RFT had not repaired a single ION IQ
15 headset. (Exh. 4 to Herrera Decl.) RFT had no basis in fact to make statements
16 about the repair rate for the ION IQ.

17 RFT's statements described above were pure speculation, and false. RFT
18 provided this false information not only to RFT's prospective customers, but also to
19 Panasonic System Communications North American ("Panasonic"), one of HME's
20 main competitors for drive-thru headset systems. [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 (Panasonic Depo. Trans., Exh. 7 to Herrera Decl. 75:9-22, 146:2-148:10, 105:18-22,
28 210:9-18, 234:22-236:6.)

1 **2. RFT’s Responses to Discovery Related to HME’s Trade Libel**
2 **Claim and Lanham Act False Advertising Claim**

3 RFT and Mr. Noorian have consistently disclaimed knowledge of the
4 Structural Failures document, the average repair rate information for the HME ION
5 IQ, and RFT’s distribution of the same. When asked to identify all persons to whom
6 RFT provided the Structural Failures document, RFT responded that the only person
7 who knew that information was Mark Sullivan, RFT’s former National Sales
8 Director, who was no longer employed by RFT. (Exh. 8 to Herrera Decl.) HME
9 challenged the sufficiency of this response, and after the parties met and conferred
10 RFT amended its response to state:

11 Mark Sullivan is the **only** person with knowledge to whom, if anyone, the
12 “HM Electronics IQ Structural Failures” document was distributed. (Exh.
13 9 to Herrera Decl.)

14 HME also asked RFT to identify persons at Panasonic who may have
15 knowledge regarding the content and distribution of the Structural Failures
16 document. RFT initially provided no substantive response, only objections, and
17 claimed that the request sought information “within the possession or control of third
18 parties and not available to Defendant.” (Exh. 8 to Herrera Decl.) HME was again
19 forced to initiate meet and confer dialogue to compel a meaningful response. In its
20 supplemental response, RFT claimed that it was “unaware of any person at
21 Panasonic who may have knowledge regarding the content and distribution of the
22 ‘HM Electronics IQ Structural Failures’ document.” (Exh. 9 to Herrera Decl.)

23 HME also propounded multiple document requests concerning the Structural
24 Failures document to RFT in August 2013. (Exh. 10 to Herrera Decl.) HME asked
25 RFT to produce documents concerning the creation and distribution of the Structural
26 Failures document, and communications regarding the document. RFT first claimed
27 that it did not know if it had responsive documents. (Exh. 11 to Herrera Decl.) After
28 HME challenged that response, RFT agreed to produce all responsive documents in

1 its possession, custody or control. (Exh. 12 to Herrera Decl.) HME also asked RFT
2 to produce documents between RFT and Panasonic concerning the Structural
3 Failures document. RFT initially claimed that such documents “were irrelevant.”
4 (Exh. 11 to Herrera Decl.) RFT then supplemented its response, again at HME’s
5 behest, and asserted “RFT has produced documents responsive to this request.”
6 (Exh. 12 to Herrera Decl.)

7 RFT began producing documents on November 25, 2013. On January 9,
8 2014, RFT claimed that it had no further documents to produce. (Exh. 13 to Herrera
9 Decl.) By that date, RFT had produced just over 1,100 pages of documents. RFT
10 produced two internal e-mail strings regarding the Structural Failures document, five
11 e-mails from Mark Sullivan forwarding the report to potential customers, and one
12 communication with Panasonic. (*See* Herrera Decl.)

13 **3. Early Deposition Testimony Regarding the Structural** 14 **Failures Document and Related Materials**

15 HME took the deposition of Mark Sullivan on April 1, 2014. Mr. Sullivan’s
16 account of the creation and distribution of the Structural Failures document, and the
17 knowledge of others at RFT (including Mr. Noorian) regarding the same, squarely
18 contradicted RFT’s sworn discovery responses. Mr. Sullivan produced documents
19 that RFT had never produced in discovery even though they were responsive to
20 HME’s document requests, and within RFT’s possession, custody or control.

21 Mr. Sullivan produced 69 pages of documents, the majority of which
22 concerned the Structural Failures document and average ION IQ repair rate
23 information distributed by RFT. Mr. Sullivan produced a May 2012 email chain that
24 described how Philip Tondelli, RFT’s Vice-President of Sales, obtained a damaged
25 ION IQ and took pictures which he then e-mailed to Mr. Sullivan. (Exh. 14 to
26 Herrera.) Mr. Sullivan told Mr. Tondelli, Mr. Noorian and others at RFT:

27 This can be our informing/explanation to the customer on why the new
28 HME - as they say in their advertising is “Half the weight, twice the
comfort”, but they don’t say it is half the durability. It would certainly

1 appear that any customer buying the IQ will be in for very frequent and
2 expensive repairs once the warranty is up. Over a 8 to 10 year life of a
3 system the customer may well spend 3X what they paid for the entire
4 system just to keep fixing the headsets.

5 Let us know your observations so we can continually get the word out.
6 (Exh. 14 to Herrera Decl.)

7 Mr. Sullivan confirmed that this email chain formed the basis for the
8 Structural Failures document. (Exh. 15 to Herrera Decl., Sullivan Depo., 152:18-21;
9 186:22-187:9, 202:7-13.) He testified that Scott Crause (RFT's Vice-President of
10 Operations) and Scott Richardson (RFT's Production Manager) "and all kinds of
11 other sources" at RFT provided input on the document. (*Id.*, 134:11-14, 141:12-19.)
12 Mr. Sullivan also produced an e-mail showing that he directed Michelle Greenwood
13 to create a "mundane lab fashion look" report for the "structural failures." Mr.
14 Noorian and others at RFT were copied on the e-mail. (Exh. 14 to Herrera Decl.)
15 Mr. Crause of RFT testified that the Structural Failures document was not backed by
16 any laboratory testing, independent or otherwise. (Exh. 4 to Herrera Decl.)

17 Mr. Sullivan produced a handful of e-mails he sent to prospective customers
18 with the Structural Failures document attached. Mr. Sullivan said he authored more
19 than 8,000 e-mails that resided on an RFT server that could be searched to identify
20 further instances of distribution. (Exh. 15 to Herrera Decl., 196:17-197-2.) Mr.
21 Sullivan testified that he believed Mr. Noorian had given his approval to distribute
22 the Structural Failures document, and that he would not have sent it out without Mr.
23 Noorian's approval. (*Id.*, 211:23-212:8.) Mr. Sullivan also produced an e-mail he
24 sent to Mr. Noorian on December 6, 2012, two days after RFT was served with the
25 Complaint and in response to Mr. Noorian's request for "ALL examples of your
26 samples material that relates to HME before end of day tomorrow." Mr. Sullivan
27 sent Mr. Noorian "a complete zip [file] of materials that pertain to this," and a list of
28 over 100 e-mails Mr. Sullivan sent since 2011 "pushing Attune" to which Mr.
Sullivan attached the Structural Failures document and average repair rate
information. (Exh. 14 to Herrera Decl.)

1 HME took Mr. Noorian's deposition on June 11, 2014. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] (Exh. 16 to Herrera Decl., Noorian Depo.,
5 311:6-12; 311:20-23, 314:7-10; 325:2-10.)

6 **4. RFT's Failure to Produce Responsive Documents**

7 HME first raised RFT's failure to produce documents responsive to HME's
8 document requests early on in discovery. HME's efforts to compel RFT to produce
9 documents are reflected in the Court record and chronicled in this Court's Order
10 dated December 15, 2014 (ECF No. 251), and will not be repeated in detail here.
11 Those efforts culminated in a January 27, 2014 order from Judge McCurine
12 compelling RFT to produce all documents identified in a January 22, 2014 joint
13 letter from the parties. RFT did not comply. The parties met and conferred, and
14 RFT's counsel offered no explanation for why RFT had not produced many
15 categories of documents, and stated that RFT had produced all responsive ESI,
16 including communications between RFT and third parties regarding the Structural
17 Failures document (Exh. 17 to Herrera Decl., 14:25-15:8; 21:20-22:4.)

18 HME was not persuaded, and filed a motion for sanctions against RFT on
19 March 20, 2014. RFT made its initial ESI production in May 2014, over eight
20 months after HME served its first set of document requests and while HME's
21 sanctions motion was pending before Magistrate Judge Burkhardt. On July 3, 2014,
22 Judge Burkhardt granted HME's motion in part, and awarded sanctions to HME.
23 (ECF No. 185, p. 20.) Judge Burkhardt found that RFT failed to produce several
24 categories of documents ordered by Judge McCurine, and that RFT failed to perform
25 ESI searches using the search terms agreed to by the parties. Judge Burkhardt,
26 unaware of RFT's ESI production in May 2014, directed RFT to perform the ESI
27 searches and produce the results by August 4, 2014. (*Id.*, p. 14.) Judge Burkhardt
28

1 also directed RFT to provide a sworn affidavit regarding its efforts to locate and
2 produce documents.

3 RFT provided an external drive containing ESI on May 18, 2014, containing
4 234,054 documents numbering over 722,000 pages. On May 23rd, RFT wrote to
5 HME citing concern that the production contained corrupt metadata and requesting
6 return of the drive. RFT's counsel also stated that "the corrupt data may have
7 compromised our initial privilege review." (Exh. 18 to Herrera Decl.) RFT sent a
8 replacement drive on May 28, 2014 containing 50,562 documents numbering
9 127,441 pages. RFT then asked HME to provide written confirmation that RFT had
10 produced all documents required by Judge Burkhardt's order, stated that "RFT did
11 indeed already produce all of the documents identified by the Court in its Order,"
12 and claimed that Judge Burkhardt's discovery order was "moot and obsolete." (Exh.
13 19 to Herrera Decl.) HME could not and would not do what RFT asked. (*See* Exh.
14 20 to Herrera Decl.)

15 RFT's counsel filed a declaration on August 4, 2014, and stated under penalty
16 of perjury that RFT "dutifully and diligently sought to produce the documents
17 identified in Judge Burkhardt's Order," that RFT had "fully complied with the
18 Court's Discovery Order," and that the declaration was intended to serve as
19 "confirmation indicating that RFT has indeed produced the list of documents
20 itemized by the Court, and that it has, in good-faith, dutifully complied with the
21 Discovery Order." RFT's counsel went on to specifically aver that RFT "produced
22 to Plaintiff's counsel its emails and other communications regarding the 'HM
23 Electronics IQ Structural Failures' document," and asked Judge Burkhardt to deem
24 that portion of her order "moot due to [RFT's] dutiful compliance by way of its
25 document production." RFT's counsel made the same representation regarding its
26 alleged production of all documents concerning the creation, receipt, use, publication
27 and distribution of the 'HM Electronics IQ Structural Failures' document," "product
28 comparison documents," documents supporting "RFT's representations regarding

1 post-warranty repair rates and costs for HME products,” and documents resulting
2 from RFT’s “broad-based ESI search using twenty-two agreed upon search terms.”
3 (ECF No. 192.)

4 When HME pointed out that Judge Burkhardt’s order required a declaration
5 from RFT, not its counsel, RFT begrudgingly provided one from Stephen Combs,
6 RFT’s IT Director. Mr. Combs made substantially the same statements and
7 representations as RFT’s counsel, under penalty of perjury, regarding RFT’s
8 production of documents and alleged compliance with Judge Burkhardt’s order.
9 (Exh. 2 to Herrera Decl.)

10 **5. RFT’s Initial ESI Production**

11 RFT’s initial production of ESI revealed that RFT’s discovery responses
12 regarding the Structural Failures document were deceitful, and indicated that RFT
13 previously withheld responsive documents. Whereas RFT’s prior document
14 productions included only five instances of distribution of the Structural Failures
15 document, its initial ESI production revealed several more instances. Moreover,
16 whereas RFT’s prior document production included only one communication with
17 Panasonic, its initial ESI production revealed hundreds of communications between
18 the two. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED] (Exh. 21 to
2 Herrera Decl.)

3 RFT's claim in its prior discovery responses, verified by Mr. Noorian, that
4 RFT was unaware of anyone at Panasonic who might have knowledge of the
5 Structural Failures document or its content was false. Documents produced by
6 Panasonic revealed that RFT and Panasonic had several additional meetings where
7 HME was discussed, and that Mr. Noorian participated in at least four of them.
8 (Herrera Decl.) Yet when HME served interrogatories asking RFT to identify all
9 meetings between RFT and Panasonic where HME was discussed, RFT served
10 objections only. (Exh. 22 to Herrera Decl.) HME was again forced to initiate meet
11 and confer efforts. RFT then provided a supplemental response stating:

12 RFT does not possess any information within its possession, custody, or
13 control that is responsive to Plaintiff's request identifying the persons
14 present, as well as the date and location of all meetings between Defendant
15 and Panasonic, wherein Plaintiff was discussed, mentioned, or referred to
16 from January 1, 2012 to the present date. However, the Defendant can
17 identify that Mark Sullivan and Lillia Taschuk – who are no longer
18 employed by the Defendant – may possess information, if such may exist,
19 responsive to this request because they would have been the individuals
20 involved in any such meetings, had they taken place. (Exh. 23 to Herrera
21 Decl.)

22 This response was knowingly false when made. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

26 [REDACTED] (See Herrera Decl. Exh. 7, Panasonic Depo. 105:18-22, 210:9-18, 231:14-
27 233:24; 234:22-235:22.)

6. RFT Wrongfully Withheld Over 100,000 Pages of ESI

What is most remarkable about RFT's initial ESI production, however, is the omission of numerous e-mails that should have been produced. After RFT made its initial ESI production, HME began receiving documents from third parties pursuant to subpoenas that (1) were responsive to HME's document requests, and (2) should have been identified through RFT's application of the agreed upon ESI search terms. HME brought this to RFT's attention by letter dated September 12, 2014. (Exh. 24 to Herrera Decl.) HME identified over 100 examples of e-mails produced by third parties that should also have been produced by RFT. Counsel for RFT stated that he was able to locate all of the documents identified by HME in RFT's ESI database that RFT provided to its ESI vendor. RFT's counsel further stated that these documents were not produced because RFT's counsel instructed RFT's ESI vendor to apply the word "confidential," standing alone, as an exclusionary privilege search term, and all documents containing the word "confidential" in any part of the text were therefore excluded from RFT's ESI production. Because the word "confidential" appears in a disclaimer at the bottom of e-mails generated by RFT, RFT's counsel further explained, the e-mails identified by HME were among those withheld. RFT's counsel then stated that tens of thousands of documents identified by RFT's ESI vendor as privileged were withheld from production and placed into a privilege database for review by RFT's counsel, but that RFT's counsel never reviewed the database. RFT's counsel agreed to produce the withheld documents. (Exh. 25 to Herrera Decl.)

On September 26, 2014, less than two months before discovery cut-off, RFT produced over 35,000 additional documents, consisting of over 100,000 pages, that were wrongfully withheld as privileged. RFT made additional productions of ESI on October 9, 2013 (over 1,600 documents in excess of 12,500 pages), and on October 23, 2014 (over 7,600 documents in excess of 42,000 pages). Despite withholding over 45,000 responsive documents totaling over 150,000 pages between May 28,

2014 and October 23, 2014, RFT failed to serve a privilege log.³ RFT's last three productions made within weeks of discovery cut-off account for more than fifty percent of its total ESI production.

7. RFT Improperly Withheld Documents Relevant to HME's Trade Libel and Lanham Act False Advertising Claims

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exh. 27 to Herrera Decl.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exh. 28 to Herrera Decl.)

[REDACTED]

[REDACTED]

[REDACTED] (Exh. 29 to Herrera

Decl.) [REDACTED]

[REDACTED]

[REDACTED]

³ Before its ESI production, RFT served a privilege log identifying 21 documents withheld as privileged. RFT did not serve an updated privilege log until November 14, 2014, and most of the documents listed appear to be completely irrelevant to this lawsuit. (Exh. 26 to Herrera Decl.)

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] (Exh. 30 to Herrera Decl.)
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] (Exh. 31 to Herrera Decl.) [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] (*Id.*)
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] (Exh.
25 32 to Herrera Decl.) [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED] (Exh. 33 to Herrera Decl.) [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] (*See, e.g.*, Exh. 34 to Herrera Decl.) RFT's
4 interrogatory responses that attempted to place all blame for distribution of the
5 materials on Mr. Sullivan were false.

6 RFT's late production of ESI included few additional e-mails showing RFT's
7 distribution of the Structural Failures document and average repair rate information.
8 RFT has failed to produce the majority of the 100-plus e-mails authored by Mr.
9 Sullivan "pushing Attune" that he identified at his deposition, even though (1) they
10 are identified in such a manner that they should easily be located in RFT's ESI
11 database, (2) they clearly existed as of December 6, 2012, (3) Mr. Sullivan told Mr.
12 Noorian that the Structural Failures document and average repair rate information
13 were attached to the e-mails, and (4) [REDACTED]
14 [REDACTED]
15 [REDACTED] (Exh. 35 to Herrera Decl.) Defendants have
16 also failed to produce Mr. Sullivan's December 6, 2012 e-mail to Mr. Noorian in its
17 original form, and have failed to produce the zip file attached to that e-mail, despite
18 specific requests for these documents. (Exh. 24 to Herrera Decl.) [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 HME still does not know the full extent of RFT's distribution of the Structural
24 Failures document and average repair rate information, and likely never will as a
25 result of Mr. Noorian's instructions to destroy evidence.





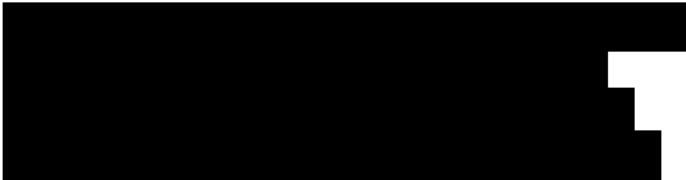



26 **8. RFT Selectively Produced Hard Copy Documents**

27 [REDACTED]
28 [REDACTED]

1 ■ In addition to wrongfully withholding responsive ESI as “privileged,” RFT
2 and Mr. Noorian selectively produced hard copy documents early on in discovery
3 that appear to support their claim that Mr. Sullivan was acting without their
4 knowledge and in alleged contravention of Mr. Noorian’s orders in distributing the
5 Structural Failures document. At the time they produced these “helpful” documents,
6 Defendants were in possession of other documents that are not so helpful, and they
7 made the conscious decision to withhold those documents from production.

8 RFT made its first several productions of documents in response to HME’s
9 first set of document requests in November and December of 2013 in hard copy
10 format, not electronically. In its first production on November 25, 2013, and in
11 response to HME’s detailed requests related to the Structural Failures document,
12 RFT produced only two internal communications regarding the document. The first
13 is a June 6, 2012 e-mail string between Mr. Noorian and Mr. Sullivan where Mr.
14 Noorian states that he has “a problem from a legal stand point for distributing [the
15 Structural Failures document] to anyone[,]” and asks Mr. Sullivan to “[p]lease wait
16 on this till I have done my research.” Mr. Sullivan responds, “OK will keep it tight.”
17 (Exh. 36 to Herrera Decl.)

18 The second is a June 8, 2012 e-mail from Mr. Noorian to Michelle Greenwood
19 where he states “This material [HME IQ Failures] is for internal use only.” (Exh. 37
20 to Herrera Decl.) Mr. Noorian sent this e-mail in response to Ms. Greenwood’s e-
21 mail on the same date circulating an updated version of the Structural Failures
22 document. (*Id.*) The form in which this e-mail was produced is noteworthy. The
23 header indicates that Ms. Greenwood forwarded this e-mail to Helen Fansler, RFT’s
24 Executive Administrator, on November 4, 2013 at 11:42 a.m., a few weeks prior to
25 the date it was produced in this litigation. However, RFT’s ESI production revealed
26 that Ms. Greenwood forwarded several other e-mails related to the Structural
27 Failures document to Ms. Fansler on November 4, 2013, but they were not included
28 in RFT’s hard copy production. These emails are set forth below:

Date	Time	Description	Bates No.
11/4/13	12:09 p.m.	 	RF362844
11/4/13	12:09 p.m. & 1:41 p.m.	 	RF362853 & RF239451
11/4/13	12:12 p.m.	 	RF362821
11/4/13	1:42 p.m. & 2:00 p.m.	 	RF493054 & RF492138

(See Exh. 38 to Herrera Decl.)

Ms. Greenwood forwarded a flurry of internal e-mails regarding the Structural Failures document to Ms. Fansler on November 4, 2013. Defendants made the conscious decision to produce only one of those e-mails, one that arguably supports their position that Mr. Noorian told Mr. Sullivan to not distribute the Structural Failures document, and to withhold the others. While this type of selective production of documents is bad enough in and of itself, Defendants made it much worse when they represented a few weeks later that they had no further documents to produce. (Exh. 13 to Herrera Decl.) There is no plausible explanation for this chain of events. Either Defendants did not provide all responsive documents they had in their possession in November 2013 to their attorneys, or they did and their attorneys chose not to produce the documents. It doesn't really matter, however, because either way the withholding of these documents is inexcusable.

This was not an oversight or simple misstep by the Defendants. It was a deliberate and calculated effort to throw HME off course in its efforts to obtain information relevant to its trade libel and false advertising claims.

B. Reasons Why This Court Should Impose Sanctions Against RFT and Mr. Noorian

1. The Court Should Impose Issue Sanctions and Evidentiary Sanctions Against RFT and Mr. Noorian

RFT's failure to produce documents related to the libelous Structural Failures document and average rate of repair and cost information for the ION IQ, in direct contravention of both Judge McCurine's discovery order and Judge Burkhardt's discovery order, warrants issue sanctions and evidentiary sanctions against both RFT and Mr. Noorian. Federal Rule of Civil Procedure 37 vest courts with authority to "issue further just orders" against a party who fails to comply with an order related to discovery, and may: (i) direct that the matters embraced in the order or other

designated facts be taken as established for purposes of the action; (ii) prohibit the disobedient party from supporting designated defenses, or introducing designated matters in evidence; and (iii) strike pleadings in whole or in part. All three sanctions are appropriate here.

2. The Falsity of the Structural Failures Document and the Average Rate of Repair and Cost Information Should be Taken as Established Facts.

RFT designed the Structural Failures document to appear as if it were a quality control document generated by HME. In a May 2012 e-mail on which Mr. Noorian was copied, Mr. Sullivan directed Ms. Greenwood to “have the attached failure report done in a mundane lab fashion with the corresponding photos next to each failure point.” [REDACTED]

[REDACTED] (Exh. 39 to Herrera Decl.) This particular communication was among the thousands that RFT wrongfully withheld from its ESI production until called to task by HME.

The Structural Failures document bears no indicia that it was prepared by RFT. [REDACTED]

[REDACTED] (Exh. 40 to Herrera Decl.) The deposition testimony of Mr. Crause revealed that the alleged “failure points” of the ION IQ were based not on any sort of testing, but on two (2) RFT employees’ examination of one disassembled HME ION IQ headset. [REDACTED]

[REDACTED] (*Id.*) In truth, RFT had never repaired an ION IQ headset when these statements were made, and could not have obtained repair rate information for the ION IQ headset from any other source.

RFT’s distribution of unsupported, speculative and false statements regarding HME’s ION IQ headset, and intentional withholding of documents relevant to RFT’s false statements, warrant an issue determination sanction. HME should not be forced

at trial to prove facts RFT and Mr. Noorian knew to be true, but withheld. The Court should determine the falsity of both (1) the Structural Failures document (Exh. 3 to Herrera Decl.) and (2) the various documents concerning the alleged average rate of repair and cost of the HME ION IQ headset (*see, e.g.* Exhs. 5 & 6 to Herrera Decl., as established facts.

3. RFT and Mr. Noorian's Awareness of the Creation and Distribution of the Structural Failures Document and Average Repair Rate Information Should be Taken as Established Facts

Throughout this lawsuit, RFT and Mr. Noorian have feigned ignorance regarding the false Structural Failures document and the manufactured average repair rate information. RFT claimed in sworn discovery responses that Mr. Sullivan was the "only person" with knowledge to whom, if anyone, the Structural Failures document was distributed. RFT further claimed that it was "unaware of any person at Panasonic who may have knowledge regarding the content and distribution 'HM Electronics IQ Structural Failures' document." (Exh. 9 to Herrera Decl.) RFT also disclaimed knowledge of any meetings between RFT and Panasonic where HME was mentioned or discussed.

RFT selectively produced e-mails in an effort to avoid culpability for its distribution of these libelous materials. For example, RFT's very first document production included two e-mails that appear to support Mr. Noorian's claim that Mr. Sullivan did not have his authorization to distribute the Structural Failures document. These documents were hand selected for hard copy production by RFT, Mr. Noorian and/or their counsel. [REDACTED]

[REDACTED] (Exh. 39 to Herrera Decl.)

[REDACTED]

[REDACTED] Defendants' election to produce Mr.

1 Noorian's response to Ms. Greenwood's e-mail, but not Mr. Tondelli's, is
2 inexplicable.

3 RFT and Mr. Noorian's claim that they were unaware that Mr. Sullivan and
4 others were distributing the Structural Failures document was also a lie. [REDACTED]

5 [REDACTED]
6 [REDACTED] (Exh. 21 to Herrera Decl.)

7 Mr. Noorian knew at that point that the report was being disseminated outside of
8 RFT, despite any contrary instructions he may have given a month prior. [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] (See Exh. 29 to
17 Herrera Decl.) Mr. Noorian became aware of the potential extent of Mr. Sullivan's
18 distribution of the Structural Failures document on December 6, 2012, two days after
19 this lawsuit was filed, when Mr. Sullivan sent Mr. Noorian numerous documents
20 concerning the report including a list of over 100 e-mails Mr. Sullivan sent out with
21 the report attached. RFT has still not accounted for all of those e-mails.

22 In light of the above, the Court should determine RFT and Mr. Noorian's
23 knowledge of both the creation and distribution of the Structural Failures document
24 and average repair rate information as established facts.
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28

4. The Court Should Preclude RFT and Mr. Noorian from Asserting that HME Was Not Damaged by the Structural Failures document, the Average Repair Rate Information, or Derivative Materials

RFT and Mr. Noorian have made it clear they intend to argue at trial that HME was not damaged by either RFT's [REDACTED] distribution of the Structural Failures document, the average repair rate information, or derivative materials created by Panasonic. Specifically, RFT and Mr. Noorian have indicated they will argue that HME is unable to establish that it lost any sales or potential sales as a result of the distribution of these materials.

The widespread dissemination of false information regarding HME's ION IQ cannot be overemphasized here. Mr. Sullivan testified to sending over 100 e-mails including the Structural Failures document and average repair rate information. [REDACTED]

[REDACTED] RFT and Mr. Noorian's spoliation of evidence and otherwise gross dereliction of their disclosure obligations have made it exceedingly difficult for HME to identify sales it may have lost as a result of the false and defamatory materials RFT distributed, because Defendants have prevented HME from identifying all recipients. As a result of Defendants' discovery abuses, HME does not know the true scope of RFT's distribution of these materials, and likely never will.

[REDACTED] (See Herrera Decl. Exh. 7, Panasonic Depo. 73:4-25, 75:9-22.) [REDACTED]

1 [REDACTED] (Exh. 21 to Herrera Decl.) [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED] (Exh. 7 to Herrera Decl., 192:17-25, 193:22-194:2, 210:9-14.) [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED] (*Id.*, pp. 79:3-
 9 81:23, 111:24-112:13, 122:4-16.) [REDACTED]
 10 [REDACTED]
 11 [REDACTED]. (*Id.* pp. 180:25-182:21, 230:4-235:25.)
 12 [REDACTED]
 13 [REDACTED]
 14 (*Id.*, pp. 112:21-113:16.)

15 RFT and Mr. Noorian should not be allowed to benefit from their abusive
 16 discovery tactics and their destruction of evidence relevant to HME's claim for
 17 damages on its trade libel and Lanham Act false advertising claims. The Court
 18 should preclude RFT and Mr. Noorian from asserting that HME was not damaged by
 19 RFT or Panasonic's distribution of the Structural Failures document, the average
 20 repair rate information, or derivative materials created by Panasonic.

21 **5. The Court Should Partially Strike Defendants' First, Ninth** 22 **and Fourteenth Affirmative Defenses**

23 RFT and Mr. Noorian's First Affirmative Defense asserts that all of HME's
 24 claims fail to state a claim; their Ninth Affirmative Defense asserts that their actions
 25 do not constitute unfair competition; and their Fourteenth Affirmative Defense
 26 asserts that they acted with privilege or justification, and for legitimate business
 27 reasons. (ECF No. 176.)
 28

1 All three affirmative defenses should be stricken as they relate to HME's Fifth
2 Cause of Action for Trade Libel and Second Cause of Action for Unfair Competition
3 under the Lanham Act (as it relates to the Structural Failures document and the
4 average repair rate information). Defendants should not be permitted to
5 simultaneously assert affirmative defenses and deny HME evidence that undermines
6 these defenses.

7 **6. The Court Should Establish a Rebuttable Presumption that**
8 **RFT's False Statements Regarding the ION IQ Were a**
9 **Substantial Factor in RFT's Sales of the Panasonic Attune**

10 The Court should establish a rebuttable presumption that RFT's distribution of
11 the Structural Failures document and average repair rate information, [REDACTED]
12 [REDACTED] were a substantial factor in RFT's sales of
13 Panasonic Attune systems during the period May 1, 2012 to the present.

14 RFT has produced documents showing that it earned [REDACTED] in
15 revenue through its sale of Panasonic Attune systems during the period May 1, 2012
16 to May 1, 2014. Because RFT has not produced sufficient and accurate information
17 regarding the scope of its distribution of the Structural Failures document and
18 average repair rate information, [REDACTED]
19 [REDACTED] it is nearly impossible for HME to connect the dots
20 between RFT's false statements regarding the ION IQ and the harm HME sustained
21 and as a result.

22 Again, Defendants should not be permitted to assert HME has not been
23 damaged by the Structural Failures document or average repair rate information
24 when RFT destroyed evidence, failed to preserve evidence, or otherwise withheld,
25 failed or refused to produce documents that would refute that claim. Allowing
26 Defendants to do so would unfairly and unjustly prejudice HME.
27
28

C. **Reasons Why This Court Should Issue a Report and Recommendation to the District Judge to Provide an Adverse Inference Instruction at Trial**

When a party destroys evidence or refuses to timely produce it, the Court has discretion to grant an adverse inference instruction to the jury. *See Residential Funding*, 306 F.2d at 107. A party seeking an adverse inference instruction must show:

(i) the party having control over the evidence had an obligation to preserve or timely produce it; (ii) the party that destroyed or failed to timely produce evidence had a “culpable state of mind”; and (iii) the missing or tardily produced evidence is “relevant” to the party’s claim or defense “such that a reasonable trier of fact could find that it would support that claim or defense.”

Gordon Partners v. Blumenthal (In re NTL, Inc. Sec. Litig.), 244 F.R.D. 179, 192 (S.D.N.Y. 2007) (citations omitted); *see also Apple, Inc. v. Samsung Elec. Co., Ltd.*, 888 F. Supp. 2d 976, 989-90 (N.D. Cal. 2012). All of these conditions are satisfied here.

First, Defendants’ duty to preserve ESI arose when litigation with HME became plausible, and no later than December 4, 2012, the date the Complaint was filed. “As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action.” *Apple*, 888 F. Supp. 2d at 991 (internal quote omitted). “This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). Defendants had a duty to preserve all ESI relevant to HME’s claims as early as May 2011, when HME sent a letter to RFT asserting claims related to HME’s trademarks. (Exh. 41 to Herrera Decl.) Even if RFT contends it did not actually expect litigation at this point, the duty to preserve unquestionably solidified when HME filed its Complaint on December 4, 2012.

1 Second, Defendants clearly had a culpable state of mind, because they
2 manipulated evidence by hand-selecting and producing relevant documents they
3 thought would be helpful to their defenses, and withholding or destroying relevant
4 documents they thought would be harmful. Defendants also intentionally or
5 recklessly disregarded their duty to timely produce responsive ESI. A party's actions
6 satisfy the culpability requirement if it intentionally or negligently destroys evidence
7 or fails to produce it. *Residential Funding*, 306 F.2d at 108. "Bad faith" is not
8 required; a party need only show that the other had "simple notice of 'potential
9 relevance to the litigation.'" *Glover*, 6 F.3d at 1329 (9th Cir. 1993). Moreover, a
10 party's failure to issue a litigation hold notice after the duty to preserve attaches is a
11 strong indicator that the destruction of relevant documents was willful. *See Jackson*
12 *Family Wines, Inc. v. Diageo N. Am., Inc.*, No. 11-5639 EMC (JSC), 2014 U.S. Dist.
13 LEXIS 19420, at *15-16 (N.D. Cal. Feb. 14, 2014). "It generally is recognized that
14 when a company or organization has a document retention policy, it 'is obligated to
15 suspend' that policy and 'implement a litigation hold to ensure the preservation of
16 relevant documents' after the preservation duty has been triggered." *Apple Inc. v.*
17 *Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012). As set forth
18 in Section III.E., *infra*, RFT did not issue a litigation hold notice.

19 Additionally, RFT and its counsel had a duty to properly communicate to
20 ensure all sources of documents were discovered. *Zubulake v. UBS Warburg LLC*,
21 229 F.R.D. 422, 432 (S.D.N.Y. 2004) ("*Zubulake II*"). RFT and its counsel failed
22 miserably in this regard, as evidenced by RFT's shifting positions on whether it had
23 responsive documents, where they were located and whether RFT had performed
24 electronic searches. After Judge Burkhardt sanctioned RFT for failing to comply
25 with Judge McCurine's Order, RFT submitted a declaration from its attorney and
26 from its IT director stating that RFT had produced all responsive ESI. That was
27 false. RFT's explanation for withholding responsive documents strains credulity and
28 strongly suggests its counsel failed to conduct a privilege review.

1 Third, Defendants' likely destruction of documents referencing the Structural
 2 Failures document, and its delay in producing ESI, support an inference that the
 3 documents were relevant to the claims against Defendants, and unfavorable to
 4 Defendants. Relevance may be inferred from a party's bad faith or gross negligence
 5 in failing to produce documents, or even its "purposeful sluggishness" in responding
 6 to discovery. *Residential Funding*, 306 F.2d at 110.

7 All elements necessary for an adverse inference instruction are present, and
 8 this is an appropriate sanction to mitigate the prejudice Defendants' actions have
 9 caused to HME. Prejudice exists where the offending party's actions have impaired
 10 the other's "ability to go to trial or threatened to interfere with the rightful decision
 11 of the case." *Apple*, 888 F. Supp. 2d at 993 (quoting *Leon*, 464 F.3d 959).
 12 Defendants' actions have interfered with the rightful decision in this case and have
 13 therefore prejudiced HME, and a sanction lesser than an adverse inference
 14 instruction would be insufficient to mitigate the harm Defendants' deliberate actions
 15 have caused HME.

16 The Court should provide an adverse inference instruction that (1) relevant
 17 documents Defendants failed to timely produce, or to produce at all, are harmful to
 18 Defendants, and (2) Defendants were aware of the falsity of the Structural Failures
 19 document and the average repair rate information, and encouraged distribution of the
 20 same.

21 **D. Reasons Why This Court Should Issue a Report and**
 22 **Recommendation to the District Judge to Find Defendants in**
Contempt of Court

23 "The standard for finding a party in civil contempt is well settled: The moving
 24 party has the burden of showing by clear and convincing evidence that the
 25 contemnors violated a specific and definite order of the court." *FTC v. Affordable*
 26 *Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). Once the moving party meets this
 27 standard, the burden shifts to the contemnor to demonstrate that he or she took every
 28 reasonable step to comply, and to articulate reasons why compliance was not

possible. *See Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983). The contemnor's subjective intent and willfulness is irrelevant. *Id.*

Here, Defendants failed to comply with Judge Burkhardt's July 3, 2014 Order that directed RFT to produce numerous categories of documents identified in proceedings before Judge McCurine, and to produce all documents identified through RFT's application of the agreed upon search terms to its ESI. Defendants did not take every reasonable step to comply with the Order, because they did not review and consequently withheld responsive documents that they erroneously segregated as privileged. The two sworn declarations Defendants provided attesting that all responsive documents had been produced were false. Defendants have still not produced all responsive documents, [REDACTED]

To assess whether an alleged contemnor has taken "every reasonable step" to comply with the terms of a court order, the district court can consider (1) a history of noncompliance, and (2) a failure to comply despite the pendency of a contempt motion. *Stone v. City and Cnty. of San Francisco*, 968 F.2d 850, 856–57 (9th Cir. 1992). RFT has already been found in contempt for failing to comply with a Court order on two prior occasions. A further contempt citation is warranted by the circumstances presented here.

E. RFT's Recent Deposition Testimony Does Not Mitigate the Sanctions Requested by HME

The recent deposition testimony provided by Mr. Noorian, as RFT's corporate designee pursuant to Federal Rule of Civil Procedure 30(b)(6), does not justify or explain the numerous instances of discovery misconduct cited above. In fact, Mr. Noorian's deposition testimony raised more questions than it answered. [REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exh. 42 to Herrera Decl., RFT Depo., p. 9:20-25.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*, p. 13:11-14.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*, pp. 79:5-25, 87:10-88:6.)

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*, pp. 12:1-4, 18:12-19:6, 44:4-8.)

[REDACTED]

[REDACTED]

[REDACTED] (RFT Depo., p. 22:13-21.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*, pp. 14:21-16:3.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*, p. 18:1-10.) The Court docket reflects that five different law firms have represented the Defendants in this case.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED] (*Id.*,
3 p. 88:9-24.)

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] (RFT Depo., pp.
8 53:8-10, 60:1-17.) [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED] (RFT Depo., pp. 53:8-54:7, 56:15-57:5, 60:1-22, 66:19-67:1.) [REDACTED]

12 [REDACTED]
13 [REDACTED] (*Id.*, p. 61:11.)

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 (RFT Depo., pp., 45:13-17, 47:21-48:4.) [REDACTED]

18 [REDACTED]
19 [REDACTED] (*Id.* 77:24-
20 78:20.) [REDACTED]

21 [REDACTED]
22 [REDACTED] (*Id.*, pp. 33:13-35:6.) [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED] (*Id.*, pp. 84:12-86:24.) Assuming for the sake of argument that is true,
27 it does not exculpate Defendants' failure to timely produce the document because
28 their attorneys did not review documents withheld on the basis of privilege.

1 On this latter issue, Mr. Noorian shed no light on the circumstances
2 surrounding RFT's failure to produced thousands of pages of ESI. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 (RFT Depo., pp. 73:23-75:7.) [REDACTED]

6 [REDACTED]
7 [REDACTED] (*Id.*, p. 67:7-25.)

8 Lastly, Mr. Noorian offered up a host of self-serving testimony regarding the
9 Structural Failures document that does not stand up to scrutiny. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] (*Id.*, p. 24:10-14.) [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] (Exh. 39 to Herrera Decl.) [REDACTED]

17 [REDACTED] (RFT
18 Depo., p. 26:18-20.) [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED] (Exh. 21 to Herrera
22 Decl.) [REDACTED]

23 [REDACTED]
24 (*Id.*) [REDACTED]
25 [REDACTED]
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1 [REDACTED] (Exh. 30 to Herrera Decl.)

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED] (Exh. 43 to Herrera Decl.) [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED] (Exh. 44 to Herrera Decl.)

10 The numerous inconsistencies in Mr. Noorian's recent deposition cast a
11 shadow of doubt on all of Mr. Noorian's testimony, and support the imposition of
12 severe sanctions against Defendants for discovery misconduct, including the
13 intentional destruction of evidence.

14 **F. Reasons Why HME is Entitled to an Award of Expenses**

15 Federal Rule of Civil Procedure 37(b)(2)(C) "provides for the award of
16 reasonable expenses and attorney's fees 'caused by the failure' to obey a court order
17 to provide or permit discovery." *Toth v. Trans World Airlines, Inc.*, 862 F.2d 1381
18 (9th Cir. 1988). An award of expenses under Rule 37(b)(2)(C) is mandatory unless
19 the party to be sanction can establish that its failure to comply was substantially
20 justified or other circumstances make an award unjust. *Hyde & Drath v. Baker*, 24
21 F.3d 1162, 1171 (9th Cir. Cal. 1994).

22 HME has incurred attorneys' fees and costs in the amount set forth in the
23 Declaration of Michelle A. Herrera in connection with its efforts to compel
24 Defendants to comply with Judge Burkhardt's Order, and the preparation of this
25 motion. Defendants should be ordered to pay those expenses. HME will update any
26

27 _____

28 4 [REDACTED] (RFT Depo., p. 23.)

1 additional attorneys' fees and costs it incurs in pursuing this motion as those
2 expenses accrue.

3 **IV. DEFENDANTS' STATEMENT IN OPPOSITION TO PLAINTIFF'S**
4 **REQUEST FOR SANCTIONS AGAINST RFT AND BABAK NOORIAN**

5 **A. INTRODUCTION**

6 The propriety of each and every one of the above requested sanctions requires
7 the finding of two foundational facts: (1) that RFT intentionally destroyed evidence
8 relevant to HME's Trade Libel and Lanham Act claims and (2) that RFT
9 intentionally delayed providing other relevant information, both to HME's
10 prejudice.⁵ HME requests that the Court find those facts based on only conjecture
11 and rhetoric. In fact, HME's subject allegations are false and were proven false
12 when HME deposed Mr. Noorian during the meet and confer in response to HME's
13 service of its portion of this Joint Motion. RFT did not intentionally destroy
14 evidence relevant to HME's Trade Libel and Lanham Act claims or intentionally
15 delay providing other relevant information. RFT's production of over 1 million
16 pages of ESI early in discovery decies HME's claims of spoliation and intentional
17 delay. In the absence of evidence of intentional destruction or evidence of
18 intentional delay, all of the relief requested by the Joint Motion should be denied.

21 ⁵ HME's portion of this Joint Motion contravenes Local Rule 7.1(h) limiting
22 moving papers to 25 pages and Judge Dembin's Civil Standing Order requiring a
23 "statement by the propounding party as to why a further response should be
24 compelled," and points and authorities "not to exceed five pages." HME sets forth
25 above nearly 7 pages of introductory facts *most of which are single spaced*, 15
26 *more* pages of doubled spaced facts, followed by 14 *more* pages of argument for a
27 total of over 36 pages. In keeping with recent filings by HME, most of the "facts"
28 discussed in the Joint Motion are designed to poison the well and argue the
underlying merits or to point to unsubstantiated claims of perceived improprieties
by RFT in its ESI production. In fact, when HME's actual requested sanctions in
the Joint Motion are dissected, it is clear that only the two "facts" discussed herein
are relevant to a determination of this motion.

B. STATEMENT OF FACTS

1. Defendants Did Not Intentionally Destroy Any Relevant Documents

HME's entire claim that RFT intentionally destroyed relevant information is an e-mail "appearing for the first time in RFT's late produced ESI." *See* above, page 20. HME alleges the following:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Exh. 31 to Herrera Decl.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

Id (emphasis in original).

HME relies on the subject e-mail as evidence that RFT destroyed evidence relevant to its Trade Libel and Lanham Act claims and that it was intentionally holding back such information in discovery. Neither is true. By agreement of the parties, HME deposed Mr. Noorian on this very point, among others, on December 18, 2014, and [REDACTED]

[REDACTED]

[REDACTED] Deposition of Babak Bob Noorian, December 18, 2014, ("Noorian Depo.") Tr.: 79:5-14 (all cites to the Noorian Depo in defendants' portion of this joint motion are attached as Exhibit A to the

1 Declaration of Brian Vanderhoof filed concurrently herewith (“Vanderhoof Decl.”).
2 The materials that were deleted were duplicates, HME has all of the subject
3 information and there has been no prejudice. HME also points to missing e-mails
4 alluded to by Mark Sullivan in his deposition to support its hypothesis that
5 defendants must have destroyed documents:

6 “RFT’s late production of ESI included few additional e-mails showing RFT’s
7 distribution of the Structural Failures document and average repair rate
8 information. RFT has failed to produce the majority of the 100-plus e-mails
9 authored by Mr. Sullivan “pushing Attune” that he identified at his deposition,
10 even though (1) they are identified in such a manner that they should easily be
11 located in RFT’s ESI database, (2) they clearly existed as of December 6,
12 2012, (3) Mr. Sullivan told Mr. Noorian that the Structural Failures document
13 and average repair rate information were attached to the e-mails, and (4) [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] (Exh. 35 to Herrera Decl.) Defendants have also failed to produce
17 Mr. Sullivan’s December 6, 2012 e-mail to Mr. Noorian in its original form,
18 and have failed to produce the zip file attached to that e-mail, despite specific
19 requests for these documents. (Exh. 24 to Herrera Decl.)

20 See above, page 21.

21 Based upon the foregoing, HME states:

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 In fact, as discussed below, RFT provided all of the subject e-mails and
28 materials referenced by Mark Sullivan to its ESI vendors early in discovery and the

1 failure to produce them at that time was the fault of the vendor and not a reflection of
2 any intent by defendants to destroy or withhold relevant information. *See*
3 Declaration of Todd Stephan filed concurrently herewith (“Stephan Decl.”), ¶¶ 4-9;
4 *see also* Declaration of Stephen M. Combs signed September 3, 2014 (Exh. 2 to
5 Herrera Decl.), and Declaration of Stephen M. Combs signed January 2, 2015, and
6 filed concurrently herewith.

7 8 **2. Defendants Did Not Intentionally Delay Producing Any Relevant Documents**

9 Defendants have been diligent in timely producing all information responsive
10 to HME’s discovery requests in this action. RFT’s first production of documents
11 was made in early November of 2013 with subsequent productions occurring in mid-
12 November, on four separate occasions in December, six occasions in January of
13 2014, four times in February, three more productions in March and another in April.
14 Vanderhoof Decl., ¶ 4. RFT made yet another production of documents on or around
15 May 5, 2014. *Id.* RFT also offered to make available for inspection hundreds of
16 thousands of pages of documents at its storage facility in Southern Illinois. *Id.* The
17 Bates range for the documents produced between November, 2013 and April, 2014 is
18 RF000001 – RF200120. *Id.*

19 LeClairRyan took the lead in discovery and in making each of the above-
20 mentioned document productions. *Id.*, ¶ 5. However, in mid to late April, RFT
21 engaged Greenberg Traurig (“GT”) to assist in this action and to assume the lead in
22 Discovery. *Id.* By the time GT was engaged, RFT had already produced 20 volumes
23 of discovery and had engaged a vendor to collect a significant amount of
24 electronically stored information (“ESI”) from its servers and email accounts. *Id.*
25 GT made two small productions of documents in May spanning Bates numbers
26 RF200121 – RF200786. *Id.*

27 Before GT became involved in the action, Plaintiff had already filed a motion
28 for contempt sanctions for RFT’s failure to produce, among other things, RFT’s ESI.

1 *Id.*, ¶ 6. The motion was filed despite RFT's agreement to make the ESI available.
2 *Id.* Nevertheless, there was a great deal of urgency in making the ESI production,
3 not only because of the pending discovery motion, but because the depositions of
4 RFT and Bob Noorian were scheduled to take place in June. *Id.* As a result, GT
5 caused RFT's ESI production to be electronically searched for privilege using key
6 words. *Id.* 59 terms included the names of attorneys, law firms, email addresses and
7 variations of spellings of each. *Id.* The privilege search terms also included the
8 terms confidential, privilege, council, counsel, attorney, lawyer, legal, privileged,
9 lawsuit, law firm, enjoin, judge, court, injunction, advice, law suit, litigation, law,
10 paralegal and privileged. *Id.* On or about May 27, 2014, GT made RFT's first ESI
11 production. *Id.* After making changes to the production due to a technical error, the
12 production consisted of Bates numbers RF200787 – RF328228. *Id.*

13 The depositions proceeded as scheduled as did the litigation. *Id.*, ¶ 7.
14 Between May 27 and June 24, RFT produced seven additional volumes of
15 documents. *Id.* On June 26, 2014, GT made a motion to withdraw from the lawsuit.
16 *Id.* LeClairRyan again assumed responsibility for taking the lead in discovery and in
17 making additional documents available to Plaintiff. *Id.* Following GT's departure,
18 LeClairRyan made four additional productions in July and August, bringing the total
19 number of volumes produced to 34. *Id.*

20 On September 12, 2014, counsel for defendants received a letter from
21 Plaintiff's counsel that identified several emails that were produced by third parties
22 that should have been contained in RFT's ESI production. *Id.*, ¶ 8. Counsel for
23 defendants investigated the matter raised by Plaintiff's counsel by searching the
24 document database and speaking with the vendor. *Id.* During the investigation,
25 counsel learned for the first time of the volume of documents that were withheld as a
26 result of the search terms that were used to separate privileged documents from
27 RFT's ESI production. *Id.* Counsel also learned for the first time that the term
28 "confidential" appeared in the footer of RFT's company emails and caused a large

1 volume of documents to be separated into the privileged folder in the ESI database.
2 *Id.* Defense counsel explained these findings to Plaintiff's counsel during
3 subsequent meet and confer discussions. *Id.* Defense counsel indicated to Plaintiff's
4 counsel that the oversight was inadvertent and that production of the emails and ESI
5 would be forthcoming. *Id.*

6 Following the conference with Plaintiff's counsel, defense counsel caused the
7 documents withheld due to the term confidential appearing in the footer of email
8 messages to be electronically searched for privilege using the 59 terms that included
9 the various attorney and law firm names described above. *Id.*, ¶ 9. The results were
10 produced to Plaintiff on or around September 26, 2014. *Id.*

11 While performing the subject privilege search counsel for defendants learned
12 for the first time that other non-attorney name privilege terms captured documents
13 that should have been produced. *Id.*, ¶ 10. Given the nature of the documents
14 withheld and the content of the messages, defense counsel determined that these
15 documents had to be reviewed for privilege by reading them as opposed to simply
16 conducting electronic searches. *Id.* 100's of hours of attorney and paralegal time
17 were required to complete the review and resulted in three additional productions
18 that were made on a rolling basis in October and November. *Id.*

19 Counsel for defendants reasonably concluded that the productions of
20 documents between September and November 2014 had accounted for all of the
21 documents that Plaintiff's counsel indicated should have been previously produced
22 by RFT. *Id.*, ¶ 11. It was not until Plaintiff filed its motion for sanctions on the last
23 day of discovery that defendants learned that Plaintiff's counsel thought otherwise.
24 *Id.* After service of Plaintiff's motion for sanctions, defense counsel contacted the
25 vendor and asked them to investigate this matter for the second time. *Id.*

26 Defendants' vendor, Setec Investigations, responded immediately and in
27 December 2014 evaluated the actual two hard drives delivered with the ESI and all
28 the original ESI provided by defendants and the 146 individual email accounts. *See*

1 Stephan Decl., ¶ 7. In reproducing tasks previously performed associated with the
2 preparation and keyword searching of this email data, Setec Investigations uncovered
3 that 14,596 email messages identified during the keyword searches as containing
4 keyword matches and that were in the queue to be exported had not actually been
5 exported onto the hard drive delivered to iDiscover LLC (the vendor who loaded the
6 ESI for review by defense counsel). *Id.* The first time Setec Investigations learned
7 that it had not provided the missing email messages, files and documents to
8 iDiscover LLC was when it reproduced the tasks described herein in December
9 2014, and the first time Setec Investigations described to anyone the circumstances
10 surrounding the missing email messages, files and documents, was shortly after
11 learning the same in December 2014. *Id.* Accordingly, neither defendants nor their
12 counsel had any reason to believe that all of the ESI responsive to HME's demands
13 was not produced as of the Spring of 2014.

14 Specifically, one of the subjects of the motion for sanctions is a screen shot of
15 "over a hundred emails" allegedly showing Mark Sullivan's distribution of the IQ
16 Structural Failures" document. Based upon counsel for defendants' review of the
17 information that has recently been uncovered by Setec Investigations, it appears that
18 there are 12,506 documents that contain the term "attune." *See* Vanderhoof Decl., ¶
19 12. Mark Sullivan is identified as a drafter, sender or recipient on 178 of those
20 documents. *Id.* Although defense counsel has not yet completed its review of all
21 12,506 documents containing the term "attune," it appears that many, if not all, of
22 the materials that are the subject of the motion for sanctions can and will be
23 produced in the near future. *Id.* Moreover, RFT's IT director has reviewed Mark
24 Sullivan's laptop and confirmed that he was generally able to locate the documents
25 referenced in the "screen shot," and further confirmed (to the extent possible given
26 the nature of the "screen shot"), that all of the emails and email attachments he
27 located on Mark Sullivan's laptop are within the ESI that he provided to Setec during
28 the data grabs. *See* Declaration of Stephen M. Combs filed concurrently herewith

1 and signed January 2, 2015, ¶¶ 2-3, and Declaration of Stephen M. Combs signed
2 September 3, 2014, ¶ 14 (Exh. 2 to Herrera Decl.).

3 C. ARGUMENT

4 HME's specific requests for sanctions are on pages 24-38 of the Joint Motion
5 above. Review of the specific requests confirms that only the two alleged facts
6 discussed above are relevant to a determination of the propriety of the requests. The
7 absence of those facts, shown by the testimony of Mr. Noorian and the declarations
8 submitted in support of defendants' portion of this Joint Motion, and discussed more
9 particularly below, confirms that HME is not entitled to any of the relief it seeks.

10 1. **Alleged Failure to Produce Documents Related to the IQ 11 Structural Failures Document.**

12 On page 24 of the Joint Motion above, HME alleges that "RFT's failure to
13 produce documents related to the libelous Structural Failures document and average
14 rate of repair and cost information for the ION IQ, in direct contravention of both
15 Judge McCurine's discovery order and Judge Burkhardt's discovery order, warrants
16 issue sanctions and evidentiary sanctions against both RFT and Mr. Noorian." This
17 allegation is false. As discussed more particularly above, RFT provided all of its ESI
18 to its discovery vendor early in the discovery process and that data included "all
19 emails and other communications regarding the "HM Electronics IQ Structural
20 Failures" document. *See* Declaration of Stephen M. Combs In Response to the
21 Court's Discovery Order, signed September 3, 2014, ¶¶ 14, 16 and 17 (Exh. 2 to
22 Herrera Decl.). As discussed above, all of the subject information was produced
23 during discovery in this matter, or to the extent it has been produced recently or is in
24 the process of production, such delay was the result of error by the vendor loading
25 the raw data into the research software, and not as a result of any conduct by RFT or
26 its attorneys. *See* Stephan Decl., ¶¶ 4-9, Vanderhoof Decl., ¶¶ 4-12.

27 Furthermore, during the meet and confer with regards to this Joint Motion,
28 RFT offered to give a deposition pursuant to Federal Rule of Civil Procedure

1 30(b)(6) for HME to test all of the allegations in the Joint Motion. *See* Dkt. 243.

2 Mr. Noorian appeared for that deposition on December 18, 2014. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED] *See* Noorian Depo Tr., 77:24-
6 78:17. [REDACTED]

7 [REDACTED]
8 [REDACTED] *Id.*, 78:18-20. In fact, the
9 subject e-mails are in the data grab that RFT completed and provided to the vendor.
10 *See* Combs Decl. dated September 3, 2014, ¶ 14 (Exh. 2 to Herrera Decl.); Combs
11 Decl. dated January 2, 2015, ¶¶ 2-3, Vanderhoof Decl., ¶ 12. Unfortunately, the
12 subject e-mails are among the less than 1% of the relevant documents that were not
13 loaded by the vendor into the search database, but which now have been produced.
14 *See* Stephan Decl. ¶¶ 4-9. Mr. Noorian's response completely undermines HME's
15 attempt to show intent to destroy or withhold information. The information was in
16 the data grab, just as Mr. Noorian assumed it should have been if it existed. All of
17 the subject information will be produced in the near future. *See* Vanderhoof Decl., ¶
18 12.

19 Counsel for HME also explored its spoliation claims at the deposition on
20 December 18, 2014, and the deposition confirmed that no relevant information had
21 been deleted. [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED] [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED] [REDACTED]
28 [REDACTED]

Noorian Depo. Tr.: 79:5-14.

Noorian Depo. Tr.: 80:1-4.

Noorian Depo. Tr.: 13:10-13.

Noorian Depo. Tr.: 36:13-20.

Accordingly, there is not basis upon which to impose issue or evidentiary sanctions against RFT and Mr. Noorian.

2. Alleged Intentional Withholding of Documents Relevant to RFT's False Statements

On Page 25 of the Joint Motion above, HME states that "RFT designed the Structural Failures document to appear as if it were a quality control document generated by HME" that the representations it made to potential customers about it

1 were false, and “RFT’s distribution of unsupported, speculative and false statements
 2 regarding HME’s ION IQ headset, and *intentional withholding of documents*
 3 *relevant to RFT’s false statements*, warrant an issue determination sanction. HME
 4 should not be forced at trial to prove facts RFT and Mr. Noorian knew to be true, but
 5 withheld.”

6 The only portion of this request for sanctions that matters for purposes of
 7 determining if an evidentiary sanction is warranted is the allegation that RFT
 8 “intentionally withheld” the subject information from production. As discussed
 9 above, RFT did not intentionally withhold anything from production. *See* Stephan
 10 Decl., ¶¶ 4-9, Vanderhoof Decl., ¶¶ 4-12, Combs Decl., signed September 3, 2014, ¶
 11 14 (Exh. 2 to Herrera Decl.), Combs Decl., signed January 2, 2015, ¶ 2.

12 **3. Alleged “Selective” Production of Emails Regarding the** 13 **Distribution of the IQ Structural Failures Document**

14 On Page 26 of the Joint Motion above, HME states “RFT and Mr. Noorian
 15 have feigned ignorance regarding the false Structural Failures document and the
 16 manufactured average repair rate information,” “RFT claimed in sworn discovery
 17 responses that Mr. Sullivan was the ‘only person’ with knowledge to whom, if
 18 anyone, the Structural Failures document was distributed” and “RFT selectively
 19 produced e-mails in an effort to avoid culpability for its distribution of these libelous
 20 materials.” HME alleges that, in light of the foregoing, “the Court should determine
 21 RFT and Mr. Noorian’s knowledge of both the creation and distribution of the
 22 Structural Failures document and average repair rate information as established
 23 facts.”

24 There is simply no evidence that Defendants selectively produced e-mails and
 25 deliberately withheld others until later. HME’s allegation is based on conjecture and
 26 speculation. The subject e-mails that HME describes in Section 8 starting at Page
 27 21, should not be judged through HME’s skewed spectacles, when HME incorrectly
 28 characterizes every delay in this action as calculated by defendants. RFT and

Noorian have already established they did not intentionally destroy any evidence whatsoever, and also did not intentionally delay providing other relevant information. RFT produced over 1 million pages of information. The small fraction of that information that was produced recently does not support inferences of misconduct. Moreover, this scenario only illustrates the benefit of having ESI searches handled by professionals rather than untrained individuals trying to conduct individual searches. It does not substantiate a nefarious purpose.

4. **Alleged “Destruction” of Information Regarding “Widespread Dissemination” of the IQ Structural Failures Report**

On Page 28 of the Joint Motion above, HME proclaims it is entitled to an issue preclusion instruction that defendants may not assert HME was not damaged by the IQ Structural Failures Report because of:

“The widespread dissemination of false information regarding HME’s ION IQ cannot be overemphasized here. Mr. Sullivan testified to sending over 100 e-mails including the Structural Failures document and average repair rate information. [REDACTED]

[REDACTED] RFT and Mr. Noorian’s spoliation of evidence and otherwise gross dereliction of their disclosure obligations have made it exceedingly difficult for HME to identify sales it may have lost as a result of the false and defamatory materials RFT distributed, because Defendants have prevented HME from identifying all recipients. As a result of Defendants’ discovery abuses, HME does not know the true scope of RFT’s distribution of these materials, and likely never will.”

Again, Mr. Noorian did not instruct Mr. Sullivan to “destroy that evidence” consisting of the 100 e-mails showing “widespread dissemination.” Mr. Noorian instructed Mr. Sullivan to destroy his duplicate copy of the IQ Structural Failures Report. None of the subject e-mails have been lost. There is no basis for a request

1 for an issue sanction. Moreover, HME's claims that they have been prevented from
 2 identifying all recipients are belied by the representations it made in opposition to
 3 HME's motion for partial summary judgment. *See* HME's Memorandum of Points
 4 and Authorities requested to be filed under seal under Docket 247 (In the
 5 Introduction HME alleges "HME identified hundreds of economic relationships in
 6 interrogatory responses" to support its claim for Intentional Interference with
 7 Prospective Economic Advantage, and discussed those relationships all through its
 8 Statement of Facts. HME's claim for Intentional Interference with Prospective
 9 Economic Advantage relies, in part, on the customers and potential customers'
 10 exposure to the IQ Structural Failures Report. *See* FAC, ¶¶ 23-26 and 68, Dkt. 156.)

11 **5. Alleged Withholding or Destruction of Evidence** 12 **Undermining Affirmative Defenses**

13 On page 29 of the Joint Motion above, HME alleges that the Court should
 14 strike defendants' First, Ninth and Fourteenth Affirmative Defenses "as they relate to
 15 HME's Fifth Cause of Action for Trade Libel and Second Cause of Action for Unfair
 16 Competition under the Lanham Act (as it relates to the Structural Failures document
 17 and the average repair rate information)." HME's sole basis for this request is
 18 consistent with its sole bases for all the other requests discussed above: "Defendants
 19 should not be permitted to simultaneously assert affirmative defenses and deny HME
 20 evidence that undermines these defenses."

21 As set forth above and in the accompanying declarations, defendants have not
 22 denied HME any evidence and certainly no evidence that "undermines these
 23 defenses." Past delays, meeting and conferring and prior discovery orders are also
 24 no basis for granting the subject request. Any improprieties of defendants have
 25 already been addressed by the Court and do not need to be redressed again. The
 26 relevant inquiry is whether or not defendants have violated Judge Burkhardt's order
 27 to produce the subject information. Defendants produced over 1 million pages of
 28 ESI. The less than 1% about which HME complains was produced towards the end

1 of the discovery period and recently, but not through any fault of defendants or its
2 lawyers.

3 Moreover, HME's claims that it has been prejudiced by the late production of
4 anything are belied by its approach to the deposition of RFT pursuant to Federal
5 Rule of Civil Procedure 30(b)(6) which it took on December 18, 2014. Defendants
6 specifically offered the deposition so that HME could inquire about any of the issues
7 raised in the subject motion for discovery sanctions, including the 100,000 pages of
8 ESI produced "late" beginning in September 2014. HME questioned Mr. Noorian on
9 only a handful of those documents. HME was not interested in curing any so called
10 prejudice. It was only interested in bolstering its position in this Joint Motion which
11 is almost wholly unchanged from its original motion served before the deposition.

12 **6. There Is No Basis for a "Rebuttable Presumption" that RFT's**
13 **False Statements Were a Substantial Factor in RFT's Sales of**
14 **the Panasonic Attune**

15 On page 30 of the Joint Motion above, HME asks for a "rebuttable
16 presumption that RFT's distribution of the Structural Failures document and average
17 repair rate information, [REDACTED]
18 were a substantial factor in RFT's sales of Panasonic Attune systems during the
19 period May 1, 2012 to the present." HME states the basis for this request is that
20 "Defendants should not be permitted to assert HME has not been damaged by the
21 Structural Failures document or average repair rate information when RFT destroyed
22 evidence, failed to preserve evidence, or otherwise withheld, failed or refused to
23 produce documents that would refute that claim."

24 HME has no basis for the requested rebuttable presumption. Defendants did
25 not destroy evidence. HME has all the relevant information that was in defendants'
26 possession, custody or control and will have a small additional piece shortly.
27 Defendants did not intentionally withhold any information or fail to preserve any
28 relevant information. Defendants have not produced documents that would "refute"
that "HME has not been damaged by the Structural Failures document or average

1 repair rate information,” because defendants do not have documents that refute its
2 claim that HME has not been damaged.

3 In addition, it is overreaching to contend that HME should receive a rebuttable
4 presumption that the distribution of the IQ Structural Failures document was a
5 substantial factor of all of the revenues of the sales of Panasonic. HME is seeking a
6 punishment that does not match the allegations of the misconduct even if all the facts
7 of the misconduct as alleged were true, which they are not. It is HME’s duty to
8 prove its damages. Defendants have done nothing to prevent HME from doing so.
9 HME is being opportunistic, seizing upon the late production of information, which
10 did not prejudice it, and trying to exact there from a sanction that is inappropriate.

11 **7. An Adverse Inference Instruction is Unwarranted**

12 On pages 31-33 of the Joint Motion above, HME requests “an adverse
13 inference instruction that (1) relevant documents Defendants failed to timely
14 produce, or to produce at all, are harmful to Defendants, and (2) Defendants were
15 aware of the falsity of the Structural Failures document and the average repair rate
16 information, and encouraged distribution of the same.” This request is similar to its
17 request above on page 26 of the Joint Motion for the Court to “determine RFT and
18 Mr. Noorian’s knowledge of both the creation and distribution of the Structural
19 Failures document and average repair rate information as established facts.” It
20 should fail for the same reasons identified above. The sole basis for HME’s request
21 for a recommendation to the District Judge for an adverse inference instruction is
22 defendants “destroyed or failed to timely produce evidence” with a “culpable state of
23 mind.” *See* page 31 above.

24 Defendants did not destroy anything.

25 Defendants did not untimely produce any evidence with any “culpable” state
26 of mind. Defendants timely provided all of their ESI to the discovery vendor.
27 Unfortunately, the discovery vendor did not properly load all of the information into
28 the search database. Less than 1% of the subject information was produced late.

1 These facts do not show any culpability of defendants. On the contrary, defendants
 2 cooperated and gathered a huge volume of information. As HME admits in the Joint
 3 Motion, defendants produced over 1 million pages of ESI responsive to HME's
 4 demands. This was a tremendous burden to accomplish. The volume was
 5 astronomical and took vendors and third parties days to manage it and prepare it for
 6 production. An honest mistake was made in the process. HME should not just be
 7 handed the requested finding, on a key issue, which is difficult to prove under all
 8 circumstances, and certainly should not be given such a finding when the
 9 "culpability" is based on conjecture and rhetoric.

10 Finally, HME claims that defendants have failed to fulfill their "duty to
 11 preserve ESI." That is also incorrect. HME deposed Mr. Noorian and specifically
 12 asked him about its preservation of ESI from the time the litigation arose. [REDACTED]

13 [REDACTED]
 14 [REDACTED] Noorian Depo. Tr.: 13:10-13. [REDACTED]
 15 [REDACTED]
 16 [REDACTED]

17 [REDACTED] Noorian Depo. Tr.: 36:13-20. In addition, the 1 million pages of
 18 ESI defendants produced completely undermines HME's claims that defendants
 19 failed to preserve its information. That production included the relevant e-mails
 20 from 146 individual email accounts. *See* Combs Decl., September 3, 2014, ¶ 14,
 21 Exh. B (Exh. 2 to Herrera Decl.).

22 Accordingly, there is no basis upon which to recommend an adverse inference
 23 instruction on the subject issue.

24 **8. There Is No Basis to Recommend a Finding of Contempt.**

25 On pages 33 and 34 of the Joint Motion above, HME requests a
 26 recommendation to the District Judge finding defendants in contempt of Court. As
 27 set forth above and in the accompanying declarations, defendants complied with the
 28 subject court orders by timely providing all of its ESI responsive to the subject

1 demands to its vendor for production. Defendants and its attorneys had no way of
 2 knowing that a small fraction of the subject information was inadvertently omitted
 3 from the vendor's upload to the search database. Considering the large volume of
 4 information and the technical issues involved, defendants' 100% compliance with
 5 the subject discovery orders was not possible without reliance on ESI professionals.
 6 Defendants did their part. The ESI professionals made a mistake. This is not a good
 7 basis for imposing contempt on defendants. In any event, even the lone remaining
 8 small portion of the ESI which was not uploaded is now ready for production and
 9 production will be completed in the near future. The information about which HME
 10 complains in the Joint Motion is among that which is found in the last batch. There
 11 is nothing left upon which to issue an order of contempt.

12 **9. Mr. Noorian's Deposition Cleared Up All Remaining Issues**

13 At pages 34-38 of the Joint Motion above, HME summarizes large portions of
 14 the Noorian deposition given on December 18, 2014. The deposition confirms all of
 15 the representations defendants have made in their portion of this Joint Motion. The
 16 most telling of the representations is the one that has now also been confirmed by the
 17 ESI vendor. [REDACTED]

18 [REDACTED] See Noorian Depo Tr., 77:24-78:17. [REDACTED]
 19 [REDACTED]

20 [REDACTED] *Id.*, 78:18-20. The subject e-mails are in the data grab that
 21 RFT completed and provided to the vendor. See Stephan Decl., ¶¶ 4-9, Vanderhoof
 22 Decl., ¶¶ 4-12, Combs Decl., signed September 3, 2014, ¶ 14 (Exh. 2 to Herrera
 23 Decl.), Combs Decl., signed January 2, 2015, ¶ 2. Mr. Noorian's response
 24 completely undermines HME's attempt to show intent to destroy or withhold
 25 information. The information was in the data grab, just as Mr. Noorian assumed it
 26 should have been if it existed. Mr. Noorian's deposition cleared up all remaining
 27 issues. HME never should have filed the instant motion. Unfortunately, it was
 28 already prepared even before the deposition so HME went ahead and filed it.

10. HME is Not Entitled to an Award of Expenses.

At page 38 of the Joint Motion above, HME requests expenses as a further sanction. HME correctly notes that an award of expenses is inappropriate if defendants show that any “failure to comply was substantially justified or other circumstances make an award unjust.” *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. Cal. 1994). First, as discussed, defendants did not fail to comply. In the alternative, to the extent the mistakes of the ESI vendor could be attributed to defendants, all the relevant circumstances demonstrate that a monetary award of expenses would be unjust. RFT did not intentionally destroy evidence relevant to HME’s claims or intentionally delay providing other relevant information.

11. The Court Should Not Impose Any Sanctions

In considering whether to impose sanctions at all where spoliation is *proven* (let alone where it is merely alleged as in this case), courts generally consider three factors: “(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.’ ” *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 563 (N.D.Cal.2008) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir.1994)); see *In re Napster*, 462 F.Supp.2d at 1066–67. “[A] party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.” *In re Napster*, 462 F.Supp.2d at 1066–67 (citing *Baliotis v. McNeil*, 870 F.Supp. 1285, 1291 (M.D.Pa.1994)).

In other words, in ruling on a request for sanctions such as those posed by HME, a court should choose “the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.” *Schmid*, 13 F.3d at 79. “Ultimately, the choice of appropriate spoliation sanctions must be determined on a case-by-case basis, and should be commensurate to the spoliating party’s motive or degree of fault in destroying the evidence.” *Apple Inc. v. Samsung*

1 *Electronics Co.*, 888 F. Supp. 2d 976, 992-93 (N.D. Cal. 2012), citing *Unigard*
2 *Security*, 982 F.2d at 368; *In re Napster*, 462 F.Supp.2d at 1066–67. For example,
3 “[c]onsistent with this principle, some courts have denied requests for an adverse
4 inference instruction even where the three-part test for spoliation was satisfied, upon
5 concluding that the degree of fault and level of prejudice were insufficient to justify
6 imposition of the sanction. See *Chin v. Port Auth. of New York & New Jersey*, 685
7 F.3d 135, 161-162 (2d Cir.2012).

8 If deletion of *duplicate* copies of the IQ Structural Failures document is even
9 fairly characterized as “spoliation,” and if there is any fault whatsoever to be
10 assigned to defendants for it—such fault is minimal considering the motive was [REDACTED]
11 [REDACTED] and also considering that the
12 original information was preserved and produced, and HME was well aware of its
13 contents from the beginning of the issues between the parties, HME having alleged
14 the IQ Structural Failures document in the Complaint and First Amended Complaint.
15 For these same reasons, the degree of prejudice suffered by HME is minimal,
16 especially in light of the discovery that none of the e-mails to third parties regarding
17 the IQ Structural Failures document were deleted and they are included in the “data
18 grab” defendants provided to their vendor.

19 There is also a “lesser sanction that will avoid substantial unfairness” to RFT.
20 Rule 37(b)(2)(A)(iv) also provides that the Court may “stay[] further proceedings
21 until the order is obeyed.” If HME needs time to consider the last less than 1% of
22 ESI, then the Court has the authority to stay these proceedings to allow it to do so.

23 **D. CONCLUSION**

24 Defendants respectfully request that the Court deny HME’s request for
25 evidentiary and other sanctions and the subject recommendations to the District
26 Court.
27
28

1 Dated: January 6, 2014

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